



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable George H. Sheppard
Comptroller of Public Accounts
Austin, Texas

Dear Sir:

Opinion No. 0-1679
Re: Does opinion 0-1448 apply to
sheriffs, in particular, and possibly
other county officers who collect fees
from the State in felony cases; and in
collecting such fees, is it necessary
that the officer make affidavit as to
the correctness thereof, secure the
approval of the district judge, etc?
And related questions

Your request for an opinion on the questions
as are herein stated has been received by this depart-
ment.

Referring to our opinion No. 0-1448, your let-
ter reads as follows:

"In the above mentioned opinion you
hold that delinquent fees of office should
not be collected by the officer whose term
of office has terminated but should be col-
lected by his successor in office. Is it
your opinion that this ruling will apply
to sheriffs, in particular, and possibly
other county officers who collect fees from
the State in felony cases; and, in collect-
ing such fees is it necessary that the of-
ficer make affidavit as to the correctness
thereof, secure the approval of the district
judge, etc?"

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"If your answer is in the affirmative, then your opinion on the following is respectfully requested:

"A term of court closes on or about December 31st, making it impossible for the officer who performed the service to collect his accounts from the State prior to January 1st. He retires from office on December 31st. Should such accounts be collected from the State by the retiring officer or his successor?

"In felony cases where punishment may be assessed as fine or jail sentence, the State pays no fees to any officer prior to final disposition. A sheriff performs certain service in such case, but the case is pending and therefore fee is not payable prior to the time he retires from office. Subsequent to the time he retires from office the case is dismissed or otherwise disposed of other than fine or jail sentence, and fee becomes payable. Should the officer who earned the fee file claim or should it be collected by his successor?

"Suppose the above mentioned case was continued for more than twelve months from the time the sheriff retired and was then dismissed--the fee was earned but did not become payable--would Article 3892 R. C. S. preclude payment to the sheriff and require that the present sheriff collect from the State and deposit with the county treasurer?"

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Article 3892 of Vernon's Civil Statutes reads as follows:

"Any officer mentioned in this Chapter who does not collect the maximum amount of his fees for any fiscal year and who reports delinquent fees for that year, shall be entitled to retain, when collected, such part of such delinquent fees as is sufficient to complete the maximum compensation authorized by Articles 3883, 3883-A, and 3886 for the year in which delinquent fees were charged, and also retain the amount of excess fees authorized by law, and the remainder of the delinquent fees for that fiscal year shall be paid as herein provided for when collected; provided, the provisions of this Article shall not apply to any officer after one year from the date he ceases to hold the office to which any delinquent fee is due, and in the event the officer earning the fees that are delinquent has not collected the same within twelve months after he ceases to hold the office, the amount of fees collected shall be paid into the county treasury. Provided, however, that nothing in this Act precludes the payment of ex-officio fees in accordance with Title 61 of the Revised Civil Statutes of Texas, 1925, as part of the maximum compensation. Provided, that any change made in this Article by this Act shall not apply to fees heretofore earned."

Article 3891, Vernon's Civil Statutes as follows:

"* * * All fees due and not collected, as shown in the report required by Article 3897, shall be collected by the officer to whose office the fees accrued and shall be disposed of by said officer in accordance with the provisions of this Act.* * *"

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In an opinion written March 17, 1933, by Honorable Homer C. DeWolfe, Assistant Attorney General, directed to Honorable K. C. Barkley, Criminal District Attorney, Houston, Texas, this department held that an officer who fails to collect his maximum and excess fees for a fiscal year, and who has reported delinquencies for that year is entitled to retain, when collected, delinquent fees sufficient to complete his maximum and excess for the year in which the delinquent fees were charged.

While Article 3894, Revised Civil Statutes, 1925, has been repealed, all fees must be collected by the officer to whose office the fees accrued, and when he has retired from office, he no longer has any authority to collect fees, even though the same were earned by him. When delinquent fees are collected, the officer collecting the same should pay them over to the retired officer until such retired officer has received his maximum and excess.

The Supreme Court of Texas in the case of Ellis County v. Thompson, 66 S. W. 48, said:

"Thompson had ceased to be the officer to whose office the fees accrued, and had no authority to collect the money after he went out of office."

It is our opinion that the above quotation is a correct expression of the law as it exists now, even though Article 3894 has been repealed, and that the only material change in the law by reason of the repeal of this article was that thereafter the officer making the collection was not entitled to a percentage of the amount collected by him.

As supporting this conclusion, we call you attention to the fact that under the provisions of the fee law now in effect, the fees earned by officers are referred to as fees of office and not as fees belonging to the individual who earned them. In *Mechem on Public Officers*, it is stated:

"As has been seen, the relation between the officer and the public is not the creature of contract, nor is the office itself a contract. So his right to compensation is not the creature of contract. It exists, if it exists at all, as the creation of law, and when it so exists, it belongs to him not by

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force of contract, but because the law attaches it to the office."

It will be further noted that under the provisions of Article 3897, Vernon's Civil Statutes, relating to the reports required to be filed, the officer is only required to file a report for a fiscal year, and that there is no provision requiring a report to be filed as to fees collected by the officer after he retires from office. If the retired officer had the right to collect delinquent fees earned by him, then it would be impossible to determine the amount which he was authorized to retain under the provisions of the fee law, and to determine the amount of excess fees payable to the county.

It has been repeatedly held by this department that the officers whose term of office has terminated has no right or authority to collect delinquent fees which are due him, that such fees shall be collected by the officer to whose office the fees accrued, and shall be disposed of by said officers in accordance with the provisions of the laws governing the same.

In a case under the following facts, "A district clerk, prior to going out of office, files all papers in the case, completes transcripts in the Court of Criminal Appeals, and then retires from office. His successor is duly elected and qualifies. The fees in the case held and tried in the former administration are now due and payable under the latter administration;" This department held in a letter opinion addressed to you on August 10, 1934, that:

"Although the fees you mentioned would belong to the first district clerk under the circumstances set out by you, since the services were completely performed by the first district clerk, (Hoke v. Simondon, 46 S. W. (2d) 1013; Barnes v. Turner, 27 S. W. (2d) 532; Cameron County v. Fox, 61 S. W. (2d) 483) it is my opinion that such fees would be delinquent fees; therefore, they would be payable and collectible by the second district clerk by virtue of the provisions of Article 3892, as amended, Revised Civil Statutes. When so collected by the second district clerk, they would

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belong in part to the first district clerk, provided the latter clerk reported them as delinquent fees in the statement required by Article 3897, as amended, Revised Civil Statutes, and provided that the first district clerk has not already collected his maximum compensation. As stated, however, the proper person to receive payment of such fees, is the second district clerk."

Articles 1033, 1034 and 1035, Code of Criminal Procedure, read as follows:

"Art. 1033. Officer shall make out cost bill

"Before the close of each term of the district court, the district or county attorney, sheriff and clerk of said court shall each make out a bill of the costs claimed to be due them by the State, respectively, in the felony cases tried at that term; the bill shall show:

"1. The style and number of each case.

"2. The offense charged against the defendant.

"3. The term of the court at which the case was disposed of.

"4. The disposition of the case, and that the case was finally disposed of, and no appeal taken.

"5. The name and number of defendants; and, if more than one, whether they were tried jointly or separately.

"6. Where each defendant was arrested, or witness served, stating the county in which the service was made, giving distance and direction from county seat of county in which the process is served.

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"7. The court shall inquire whether there have been several prosecutions for a transaction that is but one offense in law. If there is more than one prosecution for the same transaction, or a portion thereof, that could have been combined in one indictment against the same defendant, the judge shall allow fees to sheriffs, clerks and district and county attorneys in but one prosecution.

"8. Where the defendants in a case have severed on the trial, the judge shall not allow the charges for service of process and mileage to be duplicated in each case as tried; but only such additional fees shall be allowed as are caused by the severance."

"Art. 1034. Judge to examine bill, etc.

"The District Judge, when any such bill is presented to him, shall examine the same carefully, and inquire into the correctness thereof, and approve the same, in whole or in part, or disapprove the entire bill, as the facts and law may require; and such approval shall be conditioned only upon, and subject to the approval of the State Comptroller as provided for in Article 1035 of this Code, and the Judge's approval shall so state therein; and such bill, with the action of Judge thereon, shall be entered on the minutes of said Court; and immediately on the rising of said Court, the Clerk thereof shall make a certified copy from the minutes of said Court of said bill, and the action of the Judge thereon, and send same by registered letter to the Comptroller. Provided the bill herein referred to shall before being presented to such District Judge, be first presented to the County Auditor, if such there be, who shall carefully examine and check the same, and shall make whatever recommendations he shall think proper to be made to such District Judge relating to any item or the whole bill.

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"Fees due District Clerks for recording sheriff's accounts shall be paid at the end of said term; and all fees due District Clerks for making transcripts on change of venue and on appeal shall be paid as soon as the service is performed; and the Clerk's bill for such fees shall not be required to show that the case has been finally disposed of. Bills for fees for such transcripts shall be approved by the District Judge as above provided, and with the same conditions, and when approved shall be recorded as part of the minutes of the last preceding term of the Court.

"Art. 1035. Duty of Comptroller

"The Comptroller upon the receipt of such claim, and said certified copy of the minutes of said Court, shall closely and carefully examine the same, and, if he deems the same to be correct, he shall draw his warrant on the State Treasurer for the amount found by him to be due, and in favor of the officer entitled to the same. If the appropriations for paying such accounts is exhausted, the Comptroller shall file the same away, if found to be correct, and issue a certificate in the name of the officer entitled to the same, stating herein the amount of the claim and the character of the services performed. All such claims or accounts not sent to or placed on file in the office of the Comptroller within twelve (12) months from the date the same becomes due and payable shall be forever barred."

Article 1656c, Vernon's Civil Statutes, provides that the State Comptroller of Public Accounts shall prescribe and prepare the forms to be used by all county officials in the collection of county revenues, funds, fees and other moneys, and in the disbursement of all funds, shall prescribe the mode and manner of keeping and stating their accounts, which forms shall be so prepared as, in

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the judgment of the Comptroller, will meet the needs of the counties of different sizes in the State.

Also, chapters 1 and 2 of title 15 of the Code of Criminal Procedure specifically require that certain accounts presented to the Comptroller for payment shall be verified.

This department held in an opinion written by Honorable Leon O. Moses, Assistant Attorney General, on February 15, 1935, that all fees due and not collected when the official earning the same retires from office should be collected by the present incumbent of the office. We enclose a copy of this opinion for your convenience.

In view of the foregoing authorities, in answer to your first question, you are respectfully advised that it is the opinion of this department that delinquent fees of office cannot be collected by the sheriff or any other officer whose term of office has terminated, but by his successor in office.

The answer to your first question necessarily answers your second and third questions.

Answering your fourth question, you are advised that if such fees are not collected within one year after the retiring officer has ceased to hold office, the officer to whose office the fees accrued shall collect them from the state and deposit such fees with the county treasurer.

Trusting that the foregoing fully answers your inquiry, we are

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Ardell Williams*

Ardell Williams
Assistant

AW:ob
Encl.

APPROVED DEC 19, 1939

Gerard B. Mann
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